IN THE

Supreme Court of the United States

October Term, 1940.

No. 289

SOUTHERN STEAMSHIP COMPANY,
Petitioner,

v.

C. M. MEYNERS,
Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

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v.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Southern Steamship Company, prays that a writ of certiorari be issued to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on May 22, 1940, (R. 595, 624), after denial of petition for rehearing, which affirmed a final judgment of the District Court of the United States for the Southern District of Texas in the amount of $12,000.00 (R. 63).

SUMMARY AND STATEMENT OF MATTER INVOLVED.

An action at law to recover damages for personal injuries was filed by the respondent in the District Court of Harris County, Texas, which was thereafter removed to the United States District Court for the Southern District of Texas by reason of diversity of citizenship of the parties and the amount involved.

The respondent was injured when he was struck by the wheels of a moving electric crane while he was walking on an elevated track upon which the wheels of the crane travelled.

The question here involved is whether the operator of the crane was the servant of the petitioner.

The facts of the case are as follows:

On April 27, 1936, the respondent was an employee of Harris County Houston Ship Channel Navigation District, hereinafter referred to as "Navigation District", which owned and operated a wharf at Houston, Texas, which was designed and used for the loading and discharging of cargoes from steamships.

The wharf was covered by a high roof or shed, in the superstructure of which was constructed an aerial, overhead traveling electric crane. The wheels of the crane moved on two parallel rails affixed to the superstructure of the shed, 40 feet above the floor of the wharf. (R. 213.)

This overhead crane, as well as the wharf in question, known as Dock No. 4, was owned by the City of Houston, Texas and operated by the Navigation District (R. 281). The Navigation District rented this wharf and crane to various users under the terms of tariffs which it had promulgated.

Item 810 of the tariff (R. 280) provided that a charge would be made for operators of freight handling machinery and that it was expressly understood that the Port Commission acted solely as agent of the user, engaging operators and paying them for their services. The tariff states that the operator as well as the freight handling machinery is turned over to the user and is under the user's supervision and control. It further provided that the user ac-

cepted sole responsibility and liability for any damage or injury to persons or property occasioned by the use and operation of such machinery. The Port Commission did not warrant the mechanical condition of the equipment furnished and stated its sole liability to be to furnish competent mechanics and to make such repairs as were brought to its attention.

The tariff also provided that the rates for use of the electric crane "include operator but do not include electric current". It also provides for a rate per hour, for both straight and over time, for the use of said crane (R. 282).

In addition to charge for the use of the crane, the tariff also provided a separate wharfage charge per hundredweight of all cargo moved across the wharf (R. 294).

The electric crane could be used by the user under the terms of the tariff for as many hours as it desired upon paying the hourly rate and overtime rate (R. 287).

The crane and pier were not continuously or exclusively used by the petitioner, but were subject to be used by any other party in accordance with the tariff (R. 291-293).

The user of the crane was obliged to accept the operator employed by and furnished by the Navigation District and the user was without the power to hire or use any other operator (R. 282, 446, 479, 526).

No person in the employ of the appellant had any power to hire an operator for the crane, nor did the appellant have the power to discharge him (R. 468, 469, 479, 480, 511, 512, 521, 526).

The operator of the crane in this case was a regular employee of the Navigation District and was carried on its payroll as an electrician when he was not operating the crane (R. 288).

His wages for acting as electrician and operating the crane were paid by the Navigation District (R. 250, 297, 299, 300, 468, 479, 505).

The petitioner had no exclusive or rental agreement for the use of the dock and electric crane, although it had used same in accordance with the regular tariff rates for several years prior thereto (R. 291, 294, 297).

On the day in question a ship of the petitioner was moored alongside the platform immediately under the crane shed at Dock No. 4. The cargo, which consisted of pipes and tubing, was being unloaded from the ship by her own gear onto the platform or onto small hand trucks placed near the ship's side. After the pipe was discharged onto the hand trucks or onto the platform, employees of the petitioner in charge of a so-called "headman" would place slings around bundles of pipe. When this was done, without signal, (R. 324, 325, 395, 425, 426) the operator would then move his crane so that the sling around the pipe could be attached to the hook of the crane which would then lift the sling and move it toward railroad cars on a siding on the opposite side of the wharf. As this was being done, the "headman" would signal to another employee on the other side of the wharf, designated as an "end headman", the number of the car into which the load was to be placed (R. 321, 415).

As the sling was thus moved by the crane to the railroad cars, the "end headman" on the other side of the wharf would indicate to the crane operator by hand signals the car or portion of a car to which it was desired to place the pipe. The crane operator landed the pipe as indicated and after it came to rest, other employees of the petitioner in the cars removed the slings from the pipe and,

upon signal from the man in the car that the sling was free, the crane operator would move the crane back to a position taken up by the first "headman" to indicate the next load of cargo to be moved (R. 360, 369, 382).

This, in general, was the routine being followed at the time of the accident.

The operator of the crane sat in a basket suspended below the beam of the crane and had full view of the various employees of the respondent who were engaged as aforesaid. The operator of the crane faced toward the ship with his back to the warehouse toward which at times the crane moved (R. 215, 440, 445).

The respondent for several weeks prior to the accident was engaged as foreman in charge of a group of maintenance employees of the Navigation District who were painting the superstructure of the crane shed. They worked on scaffolding placed on the girders of the superstructure about 8 feet above the level of the rails on which the crane traveled. These men reached the scaffolding by going up a ladder on the side of one of the vertical columns supporting this crane, then on to the rail beam and then climbing up some smaller vertical members to the scaffolding. These workmen went up at 8 o'clock and stayed until noon and were supposed to remain there during that time except when it was absolutely essential for them to come down (R. 153).

About 11 o'clock on the morning in question the respondent found it necessary to go down from the scaffolding to get some additional paint, which he did. Returning with the paint to his place of work he ascended the ladder and went on to the rail beam without advising the operator of the crane or any of the other employees of his intention so to do. After handing the bucket to one of his workmen, he

turned his back to the crane and while walking on the track toward the ladder he was struck and injured (R. 106, 107).

The petitioner filed a cross-action against the Navigation District and the Navigation District, in turn, filed a cross-action against the petitioner. The respondent amended his complaint so as to make the Navigation a party defendant.

At the conclusion of the evidence the court directed a verdict in favor of the Navigation District as against the respondent herein; and a verdict for the Navigation District against the petitioner in the latter's cross-action; and a verdict in favor of the petitioner in the cross-action of the Navigation District against it; so that, the case went to the jury as one solely between the petitioner and the respondent (R. 549).

The trial of the case commenced on May 16, 1939, before Honorable Thomas M. Kennerly.

The court ruled, as a matter of law, at the conclusion of all the evidence that the crane operator was the agent of the petitioner (R. 543, 544).

The Trial Judge submitted certain interrogatories to the jury bearing on the petitioner's negligence and contributory negligence of the respondent (R. 59-62).

The jury found that the petitioner was negligent and that the respondent was not guilty of contributory negligence and assessed the damages at $12,000.00. (R. 62, 63.)

On June 10, 1939, the court entered judgment in favor of the respondent. (R. 63.)

An appeal from said judgment was taken to the United States Circuit Court of Appeals for the Fifth Circuit. After argument before Circuit Judges Foster, Holmes and McCord the said court rendered its opinion affirming the judg-

ment of the court below (R. 590.) The opinion was written by Circuit Judge McCord.

The petitioner herein filed a petition for rehearing on April 24, 1940, (R. 602) which was denied on May 22, 1940. (R. 624.)

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered on March 20, 1940 (R. 595). The petitioner filed a petition for rehearing on April 24, 1940, (R. 602), which petition was denied on May 22, 1940. (R. 624.)

The jurisdiction of this court to review said proceedings on a writ of certiorari is provided by Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U. S. C. A. Section 347 (a)).

The Circuit Court of Appeals erred in holding, as a matter of law on the undisputed facts, that the operator of the crane was the employee of the petitioner.

In so holding the Circuit Court of Appeals failed to follow and apply the decision of the Supreme Court of Texas in the case of *Smith Bros., Inc. v. O'Bryan,* 94 S. W. 2d; 127 Tex. 439 (Tex. Com. App. Section A, 1936), which follows the decision of this court in *Standard Oil Co. v. Anderson,* 212 U. S. 215.

The case of *Smith Bros., Inc. v. O'Bryan, supra,* has not been overruled, but has been consistently followed with approval in the cases of *Schroeder v. Rainbolt,* 97 S. W. 2d 679; 128 Tex. 269 (Tex. Com. App. 1936); *Cocke & Braden v. Ayer,* 106 S. W. 2d 1043; 129 Tex. 660 (Tex. Com. App. 1937).

A certiorari should be granted in this proceeding under the authority of *Erie Railroad Co. v. Tompkins,* 304 U. S.

64 (1938); *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202 (1938); *New York Life Insurance Co. v. Jackson*, 304 U. S. 261 (1938); *Rosenthal v. New York Life Insurance Co.*, 304 U. S. 263 (1938); and *Wichita Royalty Co. v. City National Bank of Wichita Falls*, 306 U. S. 103 (1939).

QUESTION PRESENTED.

Where the owner of machinery rents it to another, along with the services of a skilled operator, which machinery is to be used in performing a part of stevedoring work undertaken by the renter, the giving of necessary directions by the renter to such operator to indicate the work to be done do not amount to such control as to make the operator the servant of the renter.

This principle of law established by the decision of the Supreme Court of Texas in *Smith Bros., Inc. v. O'Bryan, supra,* and by this court in *Standard Oil Co. v. Anderson, supra,* was not followed by the Circuit Court of Appeals when it held, as a matter of law on the undisputed facts, that the operator of the crane was the employee of the petitioner.

This principle should have been applied under the authority of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, and the cases following it.

REASONS FOR GRANTING PETITION.

The petition should be granted because the United States Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in conflict with the law of the State of Texas declared by its highest court.

The decision in this case does not concern solely the rights of the parties hereto, but is of importance to the

many persons who use this equipment publicly offered for use under the tariffs promulgated by the Harris County Houston Ship Channel Navigation District.

SOUTHERN STEAMSHIP COMPANY,

By JOSEPH W. HENDERSON,
Counsel.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

JOSEPH W. HENDERSON, being duly sworn according to law, deposes and says that he is counsel for the petitioner herein and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

JOSEPH W. HENDERSON.

Sworn to and subscribed before me this 26th day of July, A. D. 1940.

GEORGE M. BRODHEAD, JR.,
(Seal) *Notary Public.*
My Commission Expires Jan. 19, 1943.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of the court and that it is not filed for the purpose of delay.

JOSEPH W. HENDERSON,
Counsel for Petitioner.